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TETUAN ABDUL AZIZ & ASSOCIATES v. SUNSHINE HAVEN SDN BHD

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
B AB KARIM AB JALIL JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-1473-09-2015]
18 MARCH 2016

C ***LEGAL PROFESSION:*** *Duty of care – Professional negligence – Solicitors acting in transaction for sale and purchase of land – Solicitors continued to act for vendor although subsequently not retained – Whether actions of solicitors fell far short of accepted standards of good conveyancing practice – Whether purchaser within solicitor's contemplation likely to be injured by acts or omissions – Whether there was sufficient proximity for duty of care*

D ***TORT:*** *Negligence – Professional negligence – Solicitors acting in transaction for sale and purchase of land – Solicitors continued to act for vendor although subsequently not retained – Whether actions of solicitors fell far short of accepted standards of good conveyancing practice – Whether purchaser within solicitor's contemplation to be likely injured by acts or omissions – Whether there was* E *sufficient proximity for duty of care*

The appeal was related to the decision of the High Court allowing the claim of the plaintiff ('respondent') against the second defendant legal firm ('the appellant') for breach of duty and misrepresentation. When the respondent was informed by one Chen Sak Soo, a freelance agent that a piece F of land owned by Prestasi Tulin Sdn Bhd was available for sale, the respondent instructed its solicitor to prepare a letter of offer. The letter of offer was delivered by Chen Sak Soo to the appellant, who was acting as Prestasi Tulin's solicitors in respect of the sale of the land. The respondent's solicitor continued to deal with the appellant up to the stage where the sale G and purchase agreement ('SPA') were duly stamped. However, subsequently, the respondent received a letter from Messrs Owen & Ho, the solicitors for Prestasi Tulin, denying that Prestasi Tulin had entered into the SPA to sell the land to the respondent. Consequently, the respondent filed a suit against the appellant for breach of duty and misrepresentation. The trial judge found H that the appellant, a legal firm acting as the vendor' s solicitors in a sale and purchase transaction owed a duty of care to the respondent, the purchaser and awarded damages in favour of the respondent. Hence, the appeal by the appellant on the grounds that (i) the appellant who was acting for Prestasi Tulin owed no duty of care to the respondent as the respondent was I represented by its own solicitors; (ii) even if the appellant was negligent, the

award of RM330,000 in damages was unreasonable and excessive. If at all, the appellant was only liable to reimburse the legal fees paid by the respondent to its solicitors; and (iii) the amount of costs of RM120,000 was excessive.

Held (allowing appeal; setting aside decision of High Court)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The trial judge had scrutinised and evaluated the evidence carefully before arriving at the finding that the actions of the appellant fell far short of the accepted standards of good conveyancing practice. The question of whether the appellant owed a duty of care to the respondent was a mixed question of law and fact. As a general rule, a solicitor acting for a client in a civil case owes no duty of care to the opponent either in litigation or in non-contentious business. (paras 22, 24 & 27)

(2) The relationship between two solicitors acting for their respective clients does not normally of itself impose a duty of care on one solicitor to the client of the other. Normally, the relationship is not sufficiently proximate. Each solicitor is entitled to expect that the other party will look to his own solicitor for advice and protection. What is of importance is the question of where 'the real reliance' is placed. Even if *prima facie* there was sufficient proximity for a duty of care, the consideration that the other party has a solicitor to protect his interest would normally negate a duty. (para 35)

(3) On evidence, the test of forseeability and proximity was satisfied. At all material times, the appellant put themselves out as the vendor's solicitors in her dealings with the respondent's solicitors even though it later transpired that Prestasi Tulin did not retain them. It was therefore foreseeable that the respondent *qua* purchaser was someone within the appellant's contemplation as a person so closely and directly affected by the appellant's acts and omissions that the respondent would likely be injured by those acts or omissions. (para 39)

(4) The two intermediaries *viz*, Chen Sak Soo and one Yaacob, who claimed to be appointed as the representative of Prestasi Tulin, played an active role in the sale transaction process. Consequently, what would ordinarily have been a straight forward transaction for the sale and purchase of a piece of land turned into a convoluted scheme due to the involvement and interference of the two intermediaries. Further, the conduct of DW1, a partner in the appellant's firm, as a solicitor in the sale transaction fell short of the accepted standards of good conveyancing practice. (paras 40, 41 & 42)

(5) In all the circumstances of the case, the respondent purchaser who was represented by their own solicitors did not place any reliance on the representations made by the appellant. Even if there was any reliance, the reliance was unreasonable because of the role played by the various intermediaries coupled with the conduct of PW1, a director of the respondent, and the respondent's solicitors. As such, on evidence, there were no special circumstances which gave rise to a duty of care and it would not be just and reasonable to impose a duty of care on the appellant. (para 43)

Bahasa Malaysia *Headnotes*

Rayuan ini berkaitan keputusan Mahkamah Tinggi membenarkan tuntutan plaintif ('responden') terhadap firma guaman defendan kedua ('perayu') bagi pelanggaran kewajipan dan salah nyataan. Apabila responden diberitahu oleh Chen Sak Soo, seorang ejen bebas bahawa sebidang tanah yang dimiliki oleh Prestasi Tulin Sdn Bhd hendak dijual, responden mengarahkan peguam caranya untuk menyediakan surat tawaran. Surat tawaran tersebut diserahkan oleh Chen Sak Soo kepada perayu, yang bertindak sebagai peguam cara Prestasi Tulin berkaitan jualan tanah tersebut. Peguam cara responden terus berurusan dengan perayu sehingga peringkat perjanjian jual beli ('PJB') disetemkan. Walau bagaimanapun, responden kemudiannya menerima surat daripada Tetuan Owen & Ho, peguam cara Prestasi Tulin, menafikan Prestasi Tulin memasuki PJB untuk menjual tanah kepada responden. Dengan itu, responden memfailkan guaman terhadap perayu bagi pelanggaran kewajipan dan salah nyataan. Hakim bicara mendapati bahawa perayu, firma guaman yang bertindak sebagai peguam cara penjual dalan transaksi jual beli mempunyai kewajipan berhati-hati terhadap responden, iaitu pembeli. Hakim bicara juga mendapati bahawa perayu melanggar kewajipan berhati-hati terhadap responden dan mengawardkan ganti rugi kepada responden. Oleh itu, perayu merayu atas alasan-alasan bahawa (i) perayu yang bertindak bagi Prestasi Tulin tidak mempunyai kewajipan berhati-hati terhadap responden kerana responden diwakili oleh peguam caranya sendiri; (ii) walaupun perayu cuai, award sebanyak RM330,000 sebagai ganti rugi tidak munasabah dan berlebihan. Walau apa pun, perayu hanya bertanggungan untuk membayar balik fi guaman yang dibayar oleh responden kepada peguam caranya; dan (iii) jumlah kos sebanyak RM120,000 adalah berlebihan.

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah meneliti dan menilai keterangan dengan cermat sebelum membuat dapatan bahawa tindakan-tindakan perayu jauh daripada amalan standard pemindahhakkan yang diterima. Persoalan sama ada perayu mempunyai kewajipan berhati-hati terhadap responden

adalah persoalan bercampur undang-undang dan fakta. Kaedah amnya adalah, seseorang peguam cara yang bertindak bagi anak guamnya dalam kes sivil tidak mempunyai kewajipan berhati-hati kepada lawannya sama ada dalam litigasi atau urusan yang tidak bertikaian.

(2) Hubungan antara dua peguam cara bertindak bagi anak guam masing-masing tidak, secara umumnya, mengenakan kewajipan berhati-hati kepada salah seorang peguam cara anak guam yang satu lagi. Kebiasaannya, hubungan tersebut tidak cukup rapat. Setiap peguam cara berhak mengharapkan pihak satu lagi akan meminta nasihat dan perlindungan daripada peguam caranya sendiri. Apa yang penting adalah persoalan di mana 'sandaran sebenar' diletakkan. Walaupun *prima facie* terdapat kedekatan yang mencukupi bagi kewajipan berhati-hati, pertimbangan bahawa pihak yang satu lagi ada peguam cara untuk melindungi kepentingannya akan, pada kebiasaannya, menidakkan kewajipan.

(3) Berdasarkan keterangan, ujian kebolehramalan dan kedekatan telah dipenuhi. Pada setiap masa material, perayu menonjolkan diri mereka sebagai peguam cara penjual dalam urusannya dengan peguam cara responden walaupun didapati kemudian bahawa Prestasi Tulin tidak mengekalkan mereka sebagai peguam caranya. Oleh itu, boleh diramalkan bahawa responden sebagai pembeli boleh dibayangkan oleh perayu sebagai seorang yang terjejas secara jelas dan langsung oleh tindakan dan peninggalan perayu dan responden akan mengalami kerugian oleh tindakan dan peninggalan tersebut.

(4) Dua daripada orang tengah iaitu, Sak Soo dan Yaacob, yang mendakwa dilantik sebagai wakil Prestasi Tulin, memainkan peranan aktif dalam proses transaksi jualan tersebut. Dengan itu, apa yang sepatutnya menjadi transaksi mudah bagi jual beli sebidang tanah, menjadi skim yang berbelit disebabkan penglibatan dan campur tangan dua orang tengah tersebut. Selanjutnya, tindakan DW1, rakan kongsi firma perayu, sebagai peguam cara dalam tindakan jualan tersebut tidak mencapai amalan standard pemindahhakkan yang diterima.

(5) Dalam keadaan kes tersebut, pembeli responden yang diwakili oleh peguam cara mereka sendiri tidak meletakkan apa-apa sandaran pada representasi perayu. Jika terdapat apa-apa sandaran, sandaran tersebut tidak munasabah kerana peranan yang dimainkan oleh pelbagai orang tengah ditambah dengan tindakan PW1, seorang pengarah responden, dan peguam cara responden. Oleh itu, berdasarkan keterangan, tiada hal keadaan istimewa yang membangkitkan kewajipan berhati-hati dan tidak adil dan munasabah untuk mengenakan kewajipan berhati-hati terhadap perayu.

Case(s) referred to:

Al-Kandari v. J R Brown & Co [1988] 2 WLR 671 ***(refd)***
Al-Sabah v. Ali & Ors [1999] All ER (D) 49 ***(refd)***
Allied Finance and Investments Ltd v. Haddow & Co [1983] NZLR 22 ***(refd)***
Candler v. Crane Christmas & Co [1951] 2 KB 164 ***(refd)***
Caparo Industries plc v. Dickman [1990] 2 AC 605 ***(refd)***
Clarke v. Bruce Lance & Co (A Firm) & Ors [1988] 1 WLR 881 ***(refd)***
Connell v. Odlum [1993] 2 NZLR 257 ***(refd)***
Gartside v. Sheffield, Young & Ellis [1983] NZLR 37 ***(refd)***
Gran Gelato Ltd v. Richcliff Ltd [1992] Ch 560 ***(refd)***
Hawkins v. Clayton [1988] 78 ALR 69 ***(refd)***
Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1964] AC 465 ***(refd)***
Junior Books Ltd v. Veitchi Co Ltd [1982] 3 All ER 201 ***(refd)***
Linsley v. Kirstiuk [1986] 28 DLR (4th) 495 ***(refd)***
Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd [2002] 7 CLJ 81 HC ***(refd)***
Parvathi & Anor v. Rawang Hills Resort Sdn Bhd & Anor [2003] 5 CLJ 536 HC ***(refd)***
Penn v. Bristol & West Building Society [1997] 3 All ER 470 ***(refd)***
Ross v. Caunters [1980] 1 Ch 297 ***(refd)***
Smith v. Eric S Bush [1990] 1 AC 831 ***(refd)***
Welsh v. Chief Constable of Merseyside Police [1993] 1 All ER 692 ***(refd)***
Whelton Sinclair (a firm) v. Hyland [1992] 41 EG 112 ***(refd)***
White v. Jones [1995] 2 AC 207 ***(refd)***
Wilson v. Bloomfield [1979] 123 SJ 860 ***(refd)***

Legislation referred to:

Wills Act 1837 [UK], s. 15

For the appellant - Adnan Seman; M/s Adnan Sharida & Assocs
For the respondent - R Jayasingam & Melissa Lim S H; M/s BH Lawrence

[Editor's note: Appeal from High Court, Shah Alam; Suit No: 22NCVC-256-05-2014 (overruled).]

Reported by S Barathi

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] This appeal relates to the decision of the High Court allowing the plaintiff's claim against the second defendant a legal firm for breach of duty and misrepresentation. The claim against Prestasi Tulin Sdn Bhd the first defendant (the registered land owner) was withdrawn before the commencement of the trial at the High Court. In this judgment, save for the first defendant who shall be referred to as Prestasi Tulin, the remaining parties shall be referred to as they were in the court below.

Brief Account Of The Facts

[2] Tey Soo Leng (PW1) a director of the plaintiff company was informed by one Chen Sak Soo (PW2) that a piece of land owned by Prestasi Tulin was available for sale at RM22,201,235.92.

[3] Acting on this information, on or about 19 December 2013 PW1 instructed Messrs Raja Eleena Siew Ang & Associates ("the plaintiff's solicitors") to prepare a letter of offer addressed to Prestasi Tulin.

[4] As instructed by PW1, the plaintiff's solicitors handed over the letter of offer to Chen Sak Soo for onward transmission to Prestasi Tulin. Chen Sak Soo hand delivered the letter of offer to the Tetuan Abdul Aziz & Associates (the second defendant).

[5] On 26 December 2013, the plaintiff's solicitors received a letter from the second defendant informing that (i) Prestasi Tulin have agreed and accepted the terms and conditions contained in the letter of offer and (ii) asking for the 2% earnest deposit of RM442,024.72 to be paid to them as stakeholders.

[6] By a letter dated 30 December 2013 addressed to the second defendant, the plaintiff's solicitors enclosed the plaintiff's cheque for the 2% earnest deposit sum together with a draft sale and purchase agreement ("SPA") for their approval and comments.

[7] On 24 January 2014, the plaintiff's solicitors wrote to the second defendant enclosing the SPA and memorandum of transfer duly executed by the plaintiff together with a cheque for RM1,326,074.16 being the balance of the 10% deposit sum.

[8] On 11 February 2014, the plaintiff's solicitors transmitted to the second defendant their client's cheque for RM442,024.72 being additional 2% deposit on the purchase price.

[9] On 7 March 2014, the plaintiff's solicitors wrote to the second defendant informing that Chen Sak Soo was authorised to collect the duly executed SPA, a supplemental agreement and other documents from the second defendant. By a letter of even date, the second defendant delivered to the plaintiff's solicitors the SPA and some documents duly executed by Prestasi Tulin. The plaintiff's solicitors proceeded to have the SPA and other documents duly stamped.

[10] On 14 April 2014, the plaintiff received a letter from Messrs Owen & Ho, solicitors for Prestasi Tulin denying that their client entered into the SPA to sell the land to the plaintiff and that a police report on the matter had been lodged. The plaintiff's solicitors replied to Owen & Ho on 17 April 2014 stating that they have been dealing with the second defendant who was acting as Prestasi Tulin's solicitors in respect of the sale of the land.

[11] Meanwhile, on 17 April 2014, the plaintiff's solicitors had also written to the second defendant enclosing a copy of Messrs Owen & Ho's letter asking the second defendant for their comments. The plaintiff's solicitors also reminded the second defendant to hand over Prestasi Tulin's Forms 24, 44 and 49, certified M&A, board and shareholders' resolution and other documents pursuant to the SPA.

[12] The second defendant replied to the plaintiff's solicitors on even date stating that there was an internal problem of Prestasi Tulin due to a miscommunication between the director and shareholders. On 28 April 2014, the second defendant wrote to the plaintiff's solicitors confirming that they were still holding the earnest deposit, additional deposit and balance deposit sums.

[13] Meanwhile, at the plaintiff's solicitors' request, Messrs Owen & Ho under a letter dated 23 May 2014 delivered a warrant to act and directors' resolution conferring them with the necessary authority to act for Prestasi Tulin.

[14] On 5 June 2014, the second defendant wrote to the plaintiff's solicitors that they have placed the monies paid to them as stakeholders into a fixed deposit account and proposed returning the monies to the plaintiff's solicitors; the second defendant also informed that they have lodged a police report on the matter.

[15] Meanwhile, on 27 May 2014 the plaintiff's solicitors filed the suit against Prestasi Tulin and the second defendant. The claim against the second defendant for breach of duty and misrepresentation is for the refund of the monies paid and for damages.

[16] All the monies paid have been subsequently refunded in full to the plaintiff.

Findings Of The High Court

[17] In essence, the learned judge found that the second defendant, a legal firm acting as the vendor's solicitors in a sale and purchase transaction owed a duty of care to the plaintiff, the purchaser.

[18] The learned judge also found that the second defendant was in breach of its duty of care to the plaintiff; the learned judge's findings are premised on the nine factors mentioned in sub-paras. 102(i) to (ix) of her judgment. In consequence of the said finding, the learned judge awarded damages in the sum of RM330,000 and costs of RM120,000 in favour of the plaintiff.

Submission Of Parties

[19] The second defendant's appeal is mounted on the following planks:

(i) the second defendant who was acting for Prestasi Tulin owes no duty of care to the plaintiff as the plaintiff was represented by its own solicitors

(*Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd* [2002] 7 CLJ 81; [2002] 1 MLRH 649; *Parvathi & Anor v. Rawang Hills Resort Sdn Bhd & Anor* [2003] 5 CLJ 536; [2002] 4 MLRH 31);

(ii) even if the second defendant is negligent, the award of RM330,000 in damages is unreasonable and excessive. If at all, the second defendant is only liable to reimburse the legal fees paid by the plaintiff to its solicitors; and

(iii) the amount of costs in the sum of RM120,000 is excessive.

[20] In reply, the plaintiff's submission is that the second defendant owed a duty of care to the plaintiff and that the findings of the learned judge on breach of duty of care are correct and based on the evidence. It was also submitted that the award of RM330,000 is a global figure representing the loss of use of funds. There is ample evidence to support the learned judge's findings that the plaintiff obtained a loan to finance the purchase of the property.

Our Decision

[21] As a general rule, an appellate court will be slow to disturb a decision or finding of a trial court. An appellate court starts on the premise that the trial judge had the benefit and advantage of hearing and seeing witnesses before making conclusions or inferences on weight of the evidence. Where there is conflict of evidence, an appellate court will have special regard to the fact that the trial judge saw and heard the witnesses. Accordingly, an appellate court should not interfere with the findings of fact unless there are exceptional circumstances to show that the trial court to be plainly wrong in arriving at its findings.

[22] We have perused the appeal record and considered the submission of counsel on the issue of the second defendant's conduct in the sale and purchase transaction. We are not persuaded that there is any misdirection on the evidence by the learned judge. The learned judge carefully scrutinised and evaluated the evidence before arriving at her finding that the actions of the second defendant falls far short of the accepted standards of good conveyancing practice.

[23] Be that as it may, the learned judge's award of damages in favour of the plaintiff is premised on the finding that the second defendant owed a duty of care to the plaintiff and that the second defendant breached that duty of care. In other words, the premise upon which the learned judge found for the plaintiff is predicated upon the finding that the second defendant owed a duty of care to the plaintiff.

[24] The question of whether the second defendant owed a duty of care to the plaintiff is a mixed question of law and fact. It was formerly the law that solicitors owed no duty of care to persons who were not their clients for negligent misstatement relied upon by them.

[25] Insofar as the present law is concerned, any general discussion of professional liability to third parties must start from the dissenting judgment of Denning LJ in *Candler v. Crane Christmas & Co* [1951] 2 KB 164 which was approved and relied upon by the House of Lords in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465 (HL), *Smith v. Eric S Bush* [1990] 1 AC 831, 844-845 (per Lord Templeman) and 867-868 (per Lord Jauncey), *Caparo Industries plc v. Dickman* [1990] 2 AC 605, 621-623 (per Lord Bridge) and 656-657 (Lord Jancey).

[26] The House of Lord's decision in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465 (HL) established liability for negligent misstatement relied upon by third parties. In *Smith v. Eric S Bush* (*supra*) at 865A per Lord Griffiths and *Caparo v. Dickman* (*supra*) at 617H-618B (Lord Bridge) and 633B-C (Lord Oliver), the House of Lords adopted a tripartite test in deciding whether a duty of care should be owed – (i) the test of foreseeability, (ii) proximity and (iii) whether it is just and reasonable to impose a duty of care.

[27] As a general rule, a solicitor acting for a client in a civil case will owe no duty of care to the opponent either in litigation or in non-contentious business: *Mohamad Yusop Abdul Wahab v. American Express (M) Sdn Bhd* (*supra*). In *Pavarthi & Anor v. Rawang Hills Resort Sdn Bhd & Anor* (*supra*), Low Hop Bing J (as he then was) opined that in normal conveyancing transactions, solicitors who are acting for a seller do not in general owe to the would-be buyer a duty of care when answering inquiries before contract or the like.

[28] We have also considered the following line of authorities on duties to third parties in the following situations:

Liability without reliance

Linsley v. Kirstiuk [1986] 28 DLR (4th) 495, British Columbia CA; *Hawkins v. Clayton* [1988] 78 ALR 69; *Whelton Sinclair (a firm) v. Hyland* [1992] 41 EG 112; *Penn v. Bristol and West Building Society* [1997] 3 All ER 470 (CA).

Liability to beneficiaries without reliance

Ross v. Caunters [1980] 1 Ch. 297; *White v. Jones* [1995] 2 AC 207 (HL); *Clarke v. Bruce Lance & Co (A Firm) & Ors* [1988] 1 WLR 881 (CA);

Duty of care in litigation

Al-Kandari v. J R Brown & Co [1988] 2 WLR 671 (CA); *Welsh v. Chief Constable of Merseyside Police* [1993] 1 All ER 692.

Duty of care in non-contentious business

Gran Gelato Ltd v. Richcliff Ltd [1992] Ch 560; *Allied Finance and Investments Ltd v. Haddow & Co* [1983] NZLR 22 (CA); *Connell v. Odlum* [1993] 2 NZLR 257; *Al-Sabah v. Ali & Ors* [1999] All ER (D) 49.

[29] We accept that there may be circumstances in which a solicitor owes a duty of care to a person other than his client (*Wilson v. Bloomfield* [1979] 123 SJ 860 – an arguable case that a vendor's solicitors owe a duty of care to a purchaser in answering requisitions on title).

[30] In *Ross v. Caunters* (*supra*) and in *Gartside v. Sheffield, Young & Ellis* [1983] NZLR 37, solicitors had been instructed to prepare a will. In *Ross*, they failed to warn the testator that the will should not be witnessed by the spouse of the beneficiary: when this happened the gift to the beneficiary was void under s. 15 of the Wills Act 1837. The solicitors admitted they had been negligent but contended that they owed a duty of care to the testator alone and not to the disappointed beneficiary. Rejecting this contention Megarry V.-C said at pp. 308-309:

> In considering this, three features of the case before me seem to stand out. First, there is the close degree of proximity of the plaintiff to the defendants. There is no question of whether the defendants could fairly have been expected to contemplate the plaintiff as a person likely to be affected by any lack of care on their part, or whether they ought to have done so: there is no 'ought' about this case. This is not a case where the only nexus between the plaintiff and the defendants is that the plaintiff was the ultimate recipient of a dangerous chattel or negligent mis-statement which the defendants had put into circulation. The plaintiff was named and identified in the will that the defendants drafted for the testator. Their contemplation of the plaintiff was actual, nominate and direct. It was contemplation by contract, though of course the contract was with a third party, the testator.
>
> Second, this proximity of the plaintiff to the defendants was a product of the duty of care owed by the defendants to the testator: it was in no way casual or accidental or unforeseen. The defendants accepted a duty towards the testator to take reasonable care that the will would, *inter alia*, carry a share of residue from the testator's estate to the plaintiff. In all that they did (or failed to do) in relation to the will, the solicitors were bound by the duty of care towards the testator that they had accepted; and that duty included a duty to confer a benefit on the plaintiff. When a solicitor undertakes to a client to carry through a transaction which confer a benefit on a third party, it seems to me that the duty to act with due care which binds the solicitor to his client is one which may readily be extended to the third party who is intended to benefit.
>
> Third, to hold that the defendants were under a duty of care towards the plaintiff would raise no spectre of imposing on the defendants am uncertain and unlimited liability. The liability would be open to one person alone, the plaintiff. The amount would be limited to the value of the share of residue intended for the plaintiff. There would be no question of widespread or repeated liability, as might arise from some published mis-statement upon which large numbers might rely, to their detriment. There would be no possibility of the defendants being exposed

in the well-known expression of Cardozo C.J., 'to a liability in an indeterminate amount for an indeterminate time to an indeterminate class': *Ultramares Corporation v Touche* [1931] 174 N.E. 441, 444.

At 322:

> In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb 'properly,' that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. The duty owed by a solicitor to a third party is entirely different. There is no trace of a wide and general duty to do all that properly can be done for him. Instead, in a case such as the present, there is merely a duty, owed to him as well as the client, to use proper care in carrying out the client's instructions for conferring the benefit on the third party. If it is to be held that there is a duty that is wider than that, that will have to be determined in some other case. The duty that I hold to exist in the present case, far from diluting the solicitor's duty to his client, marches with it, and, if anything, strengthens it.

[31] In *Gartside* (*supra*), the negligence alleged was a failure to comply promptly with the instructions of an aged testatrix, with the result that she died before executing a new will under which the plaintiff would have been the residuary beneficiary. The New Zealand Court of Appeal took the approach that there must be a sufficient degree of proximity between the defendant and the plaintiff to give rise to the duty of care relied on by the plaintiff. Cooke J said at pp. 43-44:

> Like Megarry V.-C in *Ross v Caunters* [1980] Ch. 297, 320-323 I think it in accordance with the way in which negligence law has been developing to confine the present decision to the kind of fact before the court. The statement of claim pleads a specific instruction to make a will containing a gift to a designated beneficiary. There is no suggestion of a conflict of interest between testator and the beneficiary. The duty of reasonable expedition in all the circumstances would be identical from the points of view of both testator and beneficiary. That is important, as it is difficult indeed to suppose that a solicitor could ever owe to an intended beneficiary a duty which in any way militated against his responsibility to his client ... In the instant kind of case the decisive factors seem to me to be the degree of proximity - in other words, the patent closeness and directness of the effect on the plaintiff coupled with the absence of any other effective remedy.

[32] In *Clarke v. Bruce Lance & Co* (*supra*), the testator, the plaintiff's father, executed a will, which had been prepared and drawn up by the defendant solicitors, by which he devised to the plaintiff an interest in a petrol service station. Subsequently the testator retained the defendants to act for him in relating to the granting to a third party of, *inter alia*, an option to purchase

the service station at the fixed price of £28,000 on the death of the testator or his wife, whichever was the later. The testator died and, the service station having increased in value substantially beyond £28,000. The plaintiff commenced an action alleging that the defendants owed a duty of care both to the testator and to him as a person whose interest under the will would to his knowledge be affected by the granting of the option, to advise the testator that the granting of a fixed price option was an uncommercial and misconceived transaction, and claiming damages for the defendant's negligence in failing so to advise the testator. The Court of Appeal held that the defendants owed no duty of care to the plaintiff when acting for the testator in relation to the grant of the option. The plaintiff had a potential interest in the service station under the will. When the defendants were instructed by the testator to prepare the option documents in favour of the third party, there is no reason why they should have been expected to contemplate the plaintiff as a person likely to be affected by any lack of care on their part; the testator was free to deal with his property during his lifetime in any way he wished, and the defendants' duty was to carry out his instructions. The object of the grant of the option had not been to benefit the plaintiff, and the defendants' contemplation of the plaintiff in relation to that grant had not therefore been actual, nominate and direct so that there had been no such close degree of proximity between them as would have been necessary to give rise to liability in negligence.

[33] In *Allied Finance and Investments Ltd v. Haddow & Co* (*supra*), the plaintiff, a moneylending company, lent Hill $25,000 on the security of a yacht which the plaintiff understood he was buying. Before the loan was made, the plaintiff's solicitors forwarded to Hill's solicitors a memorandum of terms of contract and an instrument by way of security over the yacht for Hill to execute, and asked them for a certain undertaking and a certificate. Hill's solicitors returned the instrument by way of security signed by Hill and, certified, *inter alia*, "that the instruments by way of security is fully binding on Roger Kenneth Hill" and "on behalf of our client, that there are no other charges whatsoever on the yacht Sagittarius." In fact, and to the knowledge of Hill's solicitors, the yacht was being purchased by a company of which Hill was a director and a controlling shareholder, and the money was not intended to be used to enable Hill himself to purchase any interest in it. The seller of the yacht was not fully paid and he seized it. Hill became bankrupt. The plaintiff recovered all but $7000 and sued Hill's solicitors for the balance of the loan. The High Court dismissed the claim. On appeal, the Court of Appeal entered judgment against Hill's solicitors. The Court of Appeal held that a solicitor's certificate that an instrument was fully binding on his client was an exercise of professional expertise. Hill's solicitors had given a certificate on which reliance by the other party was to be

contemplated. While the relationship between two solicitors acting for their respective clients did not normally of itself impose a duty of care on one solicitor to the client of the other, here proximity of the relationship was so close that a duty of care arose.

[34] As to when duties of care arise in tort, there are two broad areas on inquiry, namely, (i) the degree of proximity between the parties, and (ii) whether there are other considerations tending to negative or restrict a duty. Hill's solicitors had on request given a certificate on which the other party must naturally be expected to act. Far from disclaiming responsibility, the solicitor has virtually in terms accepted it. This is a classic duty of care situation. The proximity is almost as close as it could be, short of contract. In that case, the duty of care which the New Zealand Court of Appeal recognised arises in situations where a solicitor has given a certificate on which reliance by the other party to the transaction is to be contemplated.

[35] It can be seen that as a general rule, the relationship between two solicitors acting for their respective clients does not normally of itself impose a duty of care on one solicitor to the client of the other. Normally, the relationship is not sufficiently proximate. Each solicitor is entitled to expect that the other party will look to his own solicitor for advice and protection. "The concept of proximity must always involve, at least in most cases, some degree of reliance" (per Lord Roskill in *Junior Books Ltd v. Veitchi Co Ltd* [1982] 3 All ER 201 (HL)). What is of importance is the question of where "the real reliance" was placed. And even if *prima facie* there were sufficient proximity for a duty of care, the consideration that the other party has a solicitor to protect his interests would normally negative a duty.

[36] In *White v. Jones* (*supra*), a testator had executed a will in March 1982 disinheriting the plaintiffs, his two daughters in consequence of a quarrel. After a reconciliation in 1986 the testator resolved to make a new will to include legacies to each daughter and on 17 June 1986 his solicitors received a letter signed by him instructing them to prepare a will to that effect. The solicitors did nothing to implement those instructions until 16 August 1986, when he dictated an internal office memo on the matter. Thereafter, little progress was made with preparation of the will and on 14 September 1986 the testator died without the new will having been executed. Thus, the March 1986 will remain unrevoked. The trial judge dismissed the plaintiffs' claim in negligence, holding that although the defendants were in breach of their professional duty to the testator, they owed no duty of care to the plaintiffs. On appeal by the plaintiffs, the Court of Appeal gave judgment for the plaintiffs holding that the defendants owed a duty of care to the plaintiffs and were in breach of that duty. On appeal by the defendants, the House of Lords held that the assumption of responsibility by a solicitor to his client, who had given instructions for the drawing up of a will for execution extended to an intended beneficiary under the proposed will in circumstances where the

solicitor could reasonably foresee that a consequence of his negligence might result in the loss of the intended legacy without either the testator or his estate having remedy against him; and that, accordingly, in the circumstances the plaintiffs were entitled to the relief sought.

[37] Accordingly, insofar as the duty of care in non-contentious matters is concerned, the law has been largely settled by *Gran Gelato* (*supra*) which was referred with approval by Lord Goff in *White v. Jones* (*supra*). The New Zealand case of *Allied Finance* (*supra*) illustrates the principle that a duty may arise in special circumstances where (a) the purchaser or his solicitor are intended to (and do) rely on information given by the vendor's solicitor and (b) such reliance is reasonable. Thus, if a solicitor give a formal report or certificate, upon which he intends some other person (whether or not his client) to rely, then he should owe a duty of care to that other person.

[38] In order to apply the principles enunciated in the authorities above, it is necessary to advert to the following salient facts which emerged in the evidence at the trial:

(a) PW1 (a director of plaintiff company) was introduced to the land by one Chen Sak Soo a freelance agent at RM22,201,235.92. Chen Sak Soo had earlier been introduced to the land by his friend one Lee Teck Thye.

(b) The second defendant's involvement as the vendor's solicitors in the sale transaction came about after DW1 (Puan Siti Asilati binti Basri, a partner of the second defendant firm) was approached by one Encik Ariffin bin Abdul Hamid and Encik Mohamad Yaacob bin Markom. The said individuals claimed to be the appointed representatives of Prestasi Tulin (the registered owner of the land) for the sale of the land. Yaacob showed DW1 a Power of Attorney created by Prestasi Tulin under which Yaacob was appointed as the representative of Prestasi Tulin.

(c) Subsequently, on 19 December 2013 the plaintiff's solicitors issued a letter of offer addressed to Prestasi Tulin. Acting on PW1's instructions, the plaintiff's solicitors handed over the letter of offer to PW1 to be forwarded to the vendor's solicitors directly. In actual fact, PW1 handed over the letter of offer to Chen Sak Soo.

(d) Chen Sak Soo testified that he was informed by one Hj Hassan that the second defendant was acting for Prestasi Tulin.

(e) Chen Sak Soo together with Lee Teck Thye and one Encik Skuran handed over the letter of offer to DW1 at the second defendant's office.

(f) On 24 December 2013, the second defendant issued a letter to the plaintiff's solicitors acknowledging receipt of the letter of offer and confirming Prestasi Tulin's acceptance of the terms and conditions in the letter of offer.

(g) Thereafter, the plaintiff's solicitors settled the sale transaction documents and forwarded them to the second defendant for execution and return.

(h) According to PW3 the plaintiff's solicitors, the plaintiff authorised Chen Sak Soo to collect the duly executed SPA, supplemental agreement and memorandum of transfer from the second defendant on their behalf.

[39] In the first instance, we agree with the learned judge's finding that on the evidence the test of foreseeability and proximity is satisfied. At all material times, the second defendant put themselves out as the vendor's solicitors in her dealings with the plaintiff's solicitors even though it later transpired that Prestasi Tulin did not retain them. It was therefore foreseeable that the plaintiff *qua* purchaser was someone within the second defendant's contemplation as a person so closely and directly affected by the second defendant's acts and omissions that the plaintiff would be likely to be injured by those acts or omissions.

[40] Be that as it may, we will have to consider the question whether in all the circumstances of this case it would be just and reasonable to impose a duty of care on the second defendant. On the totality of the evidence, it is patently clear that two intermediaries *viz.*, Chen Sak Soo and Yaacob played an active role in the sale transaction process. First, Chen Sak Soo purported to act as an agent for the plaintiff. Second, Yaacob purported to act for Prestasi Tulin. What is more significant is this – both the plaintiff's solicitors and the second defendant acquiesced to the roles played by these two individuals. For instance, instead of sending or despatching the letter of offer directly to Prestasi Tulin, the plaintiff's solicitors handed it to PW1. PW1 handed the letter of offer to Chen Sak Soo who subsequently handed it to the second defendant. Further, the plaintiff's solicitors also acquiesced to Chen Sak Soo collecting the duly executed SPA, supplemental agreement and MOT from the second defendant on their behalf. By a letter of 28 March 2014 the second defendant also informed the plaintiff's solicitors of an agreement reached at a meeting on 28 March 2014 between Chen Sak Soo (described as the plaintiff's representative) and Yaacob (described as the vendor's representative).

[41] Consequently, what would ordinarily have been a straightforward transaction for the sale and purchase of a piece of land turned into a convoluted scheme due to the involvement and interference of those two intermediaries.

[42] We have noted the fact that DW1 testified that she acted in good faith in reliance on Yaacob and Ariffin. DW1 said that after being alerted to the fraud, she contacted Ariffin for clarification and lodged a police report on the matter. We are inclined to agree with the learned judge's finding that DW1's conduct as a solicitor in the sale transaction falls short of the accepted standards of good conveyancing practice.

[43] However, as adverted to earlier, we do not think that the second defendant is solely culpable. In this case, the plaintiff purchaser relied on Chen Sak Soo to liaise with Prestasi Tulin and the second defendant. Chen Sak Soo relied on Hj Hassan's representation that the second defendant acted for Prestasi Tulin. Chen Sak Soo was dealing with Yaacob the purported agent for Prestasi Tulin. The plaintiff's solicitors relied on PW1; this fact is borne out by the plaintiff's solicitors releasing their letter of offer to PW1 instead of despatching it directly to the addressee Prestasi Tulin. In all the circumstances, we take the view that the plaintiff purchaser who was represented by their own solicitors did not place any reliance on the representations made by the second defendant. Even if there was any reliance, we hold that the reliance is unreasonable because of the role played by the various intermediaries coupled with the conduct of PW1 and the plaintiff's solicitors. As such we do not think that on the evidence there are any special circumstances giving rise to a duty of care under the *Allied Finance* principle. Accordingly, it would not be just and reasonable to impose a duty of care on the second defendant.

[44] In the light of the above, we are constrained to hold that there was a misdirection on the law and on the facts by the learned judge. We therefore set aside the decision of the learned judge holding that the second defendant was under a duty of care to the plaintiff. Since we rule that the second defendant owed no duty of care to the plaintiff, it must follow that the plaintiff's claim should be dismissed.

[45] In consequence, the appeal is allowed. The decision of the High Court is set aside. We award costs here and below to the second defendant.